

2001

State of Utah v. Richard A. Johnson : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, :
Plaintiff/Appellee, :
v. :
RICHARD A. JOHNSON, : Case No. 20010709-CA
Defendant/Appellant. :

REPLY BRIEF OF APPELLANT

Interlocutory appeal from the Order Denying Defendant's Motion to Dismiss for Lack of Jurisdiction entered August 22, 2001, by the Honorable Denise P. Lindberg, Judge of the Third Judicial District Court in and for Salt Lake County, State of Utah.

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Clerk of the Court

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IN THE UTAH COURT OF APPEALS

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ARGUMENT

**POINT. UTAH DOES NOT HAVE JURISDICTION TO PROSECUTE
THE CHARGE OF CRIMINAL NON-SUPPORT SINCE THE FAILURE
TO SUPPORT OCCURRED IN ALASKA.**

The crime of criminal non-support is not committed wholly or partly in the state of Utah when the children reside in another state and the duty to perform exists in that state. See Appellant's opening brief at 5-14. Utah Code Ann. § 76-1-201(1)(a) (1999) indicates that Utah has jurisdiction when "the offense is committed either wholly or partly within the state." Utah Code Ann. § 76-1-201(2) instructs that "[a]n offense is committed partly within this state if either the conduct which is any element of the offense, or the result which is such an element, occurs within this state." In this case, the result did not occur in this state, so the second part of section 76-1-201 does not apply. Additionally, the first part of subsection (2) does not create jurisdiction for Utah because the *conduct* which is the element of the offense, failure to provide, occurred in Alaska.

The State incorrectly claims that a crime occurs in Utah if any element occurs in this state. State's brief at 7. The "partly" rule of subsection (2) applies, however, only if the *conduct* which is an element of the crime occurs in Utah. By including the word "*conduct*," the Legislature explicitly required that the conduct occur in this state and that having the mental state alone while in this state is not enough to create jurisdiction in Utah. Had the Legislature intended that any element, including mental state, must occur in this State in order for a crime to be committed partly in this state, it would have simply said that rather than including the term "conduct" in subsection (2). The State's claim that this alleged crime occurred in Utah because the defendant is here and had the requisite mental state is therefore incorrect because the mental state element does not involve *conduct*.

Additionally, the State is incorrect that the crime occurred partly in this state because the failure to provide support occurred here. As set forth in Appellant's opening brief at 5-13, the failure to provide support occurred where the children were located. While the conduct for any crime of omission occurs where the duty to perform lies, the crime of criminal non-support demonstrates the practicality of this rule. In a criminal non-support case, the duty to provide follows the children and the state where the children reside, not the state where the parent may be at any particular time, has the interest in prosecuting the case.

Utah Code Ann. § 78-45-4.4(1) (Supp. 1996) recognizes this concept. It states, "[o]bligations ordered for child support and medical expenses are for the use and benefit of the child and shall follow the child." This section, and by implication, subsection (4) of Utah Code Ann. § 76-1-201(4), support the notion that failure to provide support, a crime of omission, occurs at the place where the support is owed.

A number of cases in addition to those listed in Appellant's opening brief recognize this concept that the failure to provide support is committed where the children reside. See e.g. People v. Hennefent, 42 N.E.2d 633 (Ill. App. Ct. 1942) (court did not have jurisdiction over prosecution for failure to support where child and mother resided in a different county); In re Bryant, 271 P. 926 (Cal Dist. Ct. App. 1928) (jurisdiction over offense of failure to provide support for children is in county where children and mother reside); Adams v. State, 159 N.W. 726, 727 (Wis. 1916) ("place where the children were, not where the father was during the period complained of, fixes the venue of a prosecution for non-support of children"); State v. Dvoracek, 118 N.W. 399, 401 (Iowa 1908) ("venue depends on where the omission to perform the duty occurred").

The court in Dvoracek pointed out that the conduct required for failure to provide support is an omission which occurs where the children reside. 118 N.W. at 401. It stated, "The statute under consideration, save the portion in relation to abandonment, is essentially negative. The penalty is denounced, not on the commission of any affirmative

act, but on the omission of the plainest duty. Necessarily, then, the venue depends on where the omission to perform the duty occurred." Id.

The State is correct that some courts have held that the state in which the parent lives has jurisdiction to prosecute for criminal non-support. See State's brief at 12-13 and cases cited therein. These decisions are based, however, on the language of the criminal and jurisdictional statutes as well as the legislative intent as evidenced by other statutes in those states. See e.g. In re Alexander, 36 A.2d 361, 362 (Del. Super. Ct. 1944) (court looks to "exact language of the statute and the policy of the State as indicated by the legislative Acts" in determining whether Delaware had jurisdiction to prosecute father for non-support); Government of the Virgin Islands v. Audain, 366 F. Supp. 710, 713 (D. Virgin Is. 1973) (court examines statutory scheme of Virgin Islands); State v. James, 100 A.2d 12, 16 (Md. 1953) (statute explicitly provided for jurisdiction over father even if children did not reside in state, stating, "[a] person charged with a violation of this section may be prosecuted in the jurisdiction where he or the wife or the child resides"); State v. Jackson, 112 S.E.2d 452, 455, 457 (W. Va. 1960) (emphasis deleted) (statute explicitly stated that offense of failure to provide was "committed in any county in which such husband, parent, wife, child or children may be . . ."). Because Utah's statutory scheme does not contain explicit language stating that Utah has jurisdiction under these circumstances and instead indicates a legislative intent that the obligation to support follows the child and that the conduct for a crime of omission

occurs where the duty to perform lies, these decisions interpreting different statutory schemes are not persuasive.

Additionally, in some of the cases cited by the State in support of its position, the child was in the same state as the father or otherwise had a significant connection with the charging state when charges were filed. See Alexander, 36 A.2d at 362 (wife and child were in Delaware when proceedings were begun and later left for Pennsylvania); State v. Borum, 178 So. 371, 373 (La. 1937) (the family's domicile was Louisiana up until the time the father abandoned them); State v. Rosenstock, 1995 WL 723535 (Ohio App. 10 Dist.) (unpublished) (court concluded Ohio had jurisdiction under its statutory scheme in case where wife and child had apparently resided in Ohio for seventeen years before leaving for Maryland). In fact, the court recognized in Borum that if the family had not previously been domiciled in Louisiana, Louisiana might not have had jurisdiction to prosecute the father for desertion and non-support.

Defendant contends that his wrongful act is not such as to make him amenable to the laws of this state, because his minor children were residing outside the state at the time he is charged with their nonsupport.

If the domicile of defendant and his family had always been in Mississippi, and if his first wife and children had never acquired a domicile in Louisiana and defendant was only temporarily in this state, there might be some merit in his contention. But that is not the case.

Id. at 373. By contrast, in the present case, Appellant's wife and children have never been domiciled in Utah and have never even visited Utah.

The State also takes issue with the proposition set forth in Poole v. State, 208 N.W. 2d 328, 331 (Wis. 1973) that the "crime of nonsupport is a continuing offense that follows the children" and the place where the children reside is the location where the crime is committed. See State's brief at 15. The State suggests that the Wisconsin court of appeals decision in State v. Gantt, 548 N.W.2d 134, 136 (Wis. Ct. App. 1996) undermines the Wisconsin Supreme Court decision in Poole. State's brief at 15. Aside from the obvious response that a lower court cannot overrule the supreme court's holding that the crime of non-support follows the children, a review of Gantt clarifies that Gantt discussed an entirely different jurisdictional question than the one before the Court in Poole or this case.

In Gantt, neither the father nor his former wife and children lived in Wisconsin during the period in which it was alleged that Gantt failed to provide support. Gantt, 548 N.W. at 136. The court concluded it had jurisdiction despite the fact that none of the interested parties resided in the state because the prosecution was "based on Gantt's willful failure to comply with a valid Wisconsin judgment requiring him to pay child support to the clerk of the Dane County Circuit Court." Id. at 211. In other words, the prosecution was not based on a general failure to provide support, as was the case in Poole as well as the present case. Instead, the Gantt court emphasized that the prosecution was based on failure to pay ordered support and Wisconsin therefore had

jurisdiction to enforce the order that was entered by Wisconsin courts. This distinction was critical to the court's holding:

In both *Adams* [v. *State*, 159 N.W. 726, 727 (Wis. 1916)] and *Poole* the prosecutions were based not on the violation of a court order but rather on the general statutory obligation to provide support for minor children. [footnote omitted]. As a result, the obligations underlying those prosecutions derived not from an accomplished judicial act, as in this case, but on allegations that general laws governing parental responsibility had been violated. *And those obligations ran directly to the children - - at the place where they and their custodial parents resided - - without any court or government involvement.*

Adams and *Poole* are thus consistent with the general criminal-law rule that a crime involving a failure to act is committed at the place where the act is required to be performed

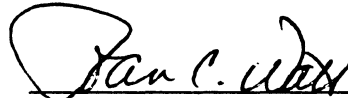
Id. at 210-211 (emphasis added). Because Gantt involved a consideration of whether Wisconsin had jurisdiction to prosecute a failure to comply with a Wisconsin support order, it did not undermine Poole and has no bearing on the issue before the court in this case.

Utah's statutory scheme demonstrates a legislative intent that the conduct associated with an omission to perform a duty is committed at the location where the duty is owed. Utah's statutory scheme likewise demonstrates that the Legislature intended that the obligation to support children follows the children. Utah therefore does not have jurisdiction to prosecute Johnson for criminal non-support in this case where the children have not been to this state and reside in Alaska.

CONCLUSION

Defendant/Appellant Richard Johnson respectfully requests that this Court reverse the Order of the lower court and order that the case be dismissed.

DATED this 27th day of September, 2002.

A handwritten signature in black ink, appearing to read "Joan C. Watt", is written over a horizontal line.

JOAN C. WATT

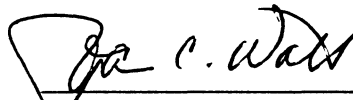
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CERTIFICATE OF DELIVERY

I, JOAN C. WATT, hereby certify that I have caused to be delivered the original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, P. O. Box 140230, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P. O. Box 140854, Salt Lake City, Utah 84114-0854, this 27th day of September, 2002.



JOAN C. WATT

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this _____ day of September, 2002.
